



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2008-0408; FRL-9984-28-Region 6]

#### Approval and Promulgation of Implementation Plans; Texas; Interstate Transport Requirements for the 1997 Ozone National Ambient Air Quality Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve portions of two Texas State Implementation Plan (SIP) submittals that pertain to the good neighbor and interstate transport requirements of the CAA with respect to the 1997 ozone National Ambient Air Quality Standards (NAAQS). The good neighbor provision requires each state, in its SIP, to prohibit emissions that will significantly contribute to nonattainment, or interfere with maintenance, of a NAAQS in other states. In this action, EPA is proposing to approve the Texas SIP submittals as having met the requirements of the good neighbor provision for the 1997 ozone NAAQS in accordance with section 110 of the CAA.

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2008-0408, at <http://www.regulations.gov> or via email to [young.carl@epa.gov](mailto:young.carl@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information

(CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Carl Young, 214-665-6645, [young.carl@epa.gov](mailto:young.carl@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Carl Young, 214-665-6645, [young.carl@epa.gov](mailto:young.carl@epa.gov). To inspect the hard copy materials, please schedule an appointment with Mr. Young or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

## **I. Background**

### *A. The 1997 8-hour Ozone NAAQS and Interstate Transport of Air Pollution*

Under section 109 of the CAA, we establish NAAQS to protect human health and public welfare. In 1997, we established new 8-hour primary and secondary ozone NAAQS of 0.08 parts

per million (62 FR 38856, July 18, 1997).<sup>1</sup> Ground level ozone is formed when nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) react in the presence of sunlight.

Section 110(a)(1) of the CAA requires states to submit, within three years after promulgation of a new or revised standard, SIPs meeting the applicable “infrastructure” elements set forth in Section 110(a)(2). One of these applicable infrastructure elements, CAA section 110(a)(2)(D)(i), requires SIPs to contain “good neighbor” provisions to prohibit certain adverse air quality effects on neighboring states due to interstate transport of pollution. There are four sub-elements within CAA section 110(a)(2)(D)(i). This action reviews how the first two sub-elements of the good neighbor provisions at CAA section 110(a)(2)(D)(i)(I) were addressed in the infrastructure SIP submittals from Texas for the 1997 8-hour ozone NAAQS. These sub-elements require that each SIP for a new or revised NAAQS contain adequate provisions to prohibit any emissions activity within the state from emitting air pollutants that will “contribute significantly to nonattainment” or “interfere with maintenance” of the applicable air quality standard in any other state.

The EPA has addressed the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 1997 8-hour ozone NAAQS in several past regulatory actions. Most relevant to this action, we promulgated the Clean Air Interstate Rule (CAIR) in 2005 to address the requirements of the good neighbor provision for the 1997 fine particulate PM<sub>2.5</sub> and 1997 ozone NAAQS (May 12, 2005, 70 FR 25172). While Texas was included in CAIR with respect to the 1997 PM<sub>2.5</sub> NAAQS, we determined that Texas would not significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other

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<sup>1</sup> In 2008, we revised the 8-hour ozone NAAQS to 0.075 ppm (73 FR 16436, March 27, 2008) and in 2015 we revised the 8-hour ozone NAAQS to 0.070 ppm (80 FR 65292, October 26, 2015). This proposal pertains to the 1997 8-hour ozone NAAQS only.

states. However, CAIR was remanded by the D.C. Circuit in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *modified on reh'g*, 550 F.3d 1176. The court determined that CAIR was “fundamentally flawed” and ordered EPA to “redo its analysis from the ground up.” 531 F.3d at 929.

In 2011 we promulgated the Cross-State Air Pollution Rule (CSAPR) to address the remand of CAIR.<sup>2</sup> CSAPR addressed the state and federal obligations under CAA section 110(a)(2)(D)(i)(I) to prohibit air pollution contributing significantly to nonattainment in, or interfering with maintenance by, any other state with regard to the 1997 8-hour ozone NAAQS and the 1997 annual PM<sub>2.5</sub> NAAQS, as well as the 2006 24-hour PM<sub>2.5</sub> NAAQS. To address Texas’ transport obligation under CAA section 110(a)(2)(D)(i)(I) with regard to the 1997 8-hour ozone NAAQS, CSAPR established Federal Implementation Plan (FIP) requirements for affected electric generating units (EGUs) in Texas, including an emissions budget that applied to the EGUs’ collective ozone-season emissions of NO<sub>x</sub>. The CSAPR budgets were to be implemented in two phases, with phase 1 to be implemented beginning with the 2012 ozone season and phase 2 to be implemented beginning with the 2014 ozone season.<sup>3</sup> Due to litigation, phase 1 of CSAPR was not implemented until 2015 and phase 2 was set to be implemented beginning in 2017. (81 FR 13275, March 14, 2016).

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<sup>2</sup> Federal Implementation Plans; Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011) (codified as amended at 40 CFR 52.38 and 52.39 and 40 CFR part 97).

<sup>3</sup> However, the implementation of the emissions budgets was stayed by the D.C. Circuit in December 2011 pending further litigation. The D.C. Circuit initially issued a decision in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (*EME Homer City I*), vacating CSAPR, but in April 2014, the Supreme Court issued an opinion reversing the D.C. Circuit and remanding the case for further proceedings. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600–01 (2014). After the Supreme Court issued its decision, the D.C. Circuit granted a motion from EPA to lift the stay and toll the compliance timeframes by three years. *See Respondents’ Motion to Lift the Stay Entered on December 30, 2011*, Document #1499505, *EME Homer City Generation, L.P. v. EPA*, No. 11–1302 (D.C. Cir. filed June 26, 2014); *Order*, Document #1518738, *EME Homer City Generation, L.P. v. EPA*, No. 11–1302 (D.C. Cir. issued Oct. 23, 2014).

In subsequent litigation (*See generally EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (DC Cir. Ct. App. 2015) (“*EME Homer City II*” herein)), the court reviewed our ability to regulate interstate air pollution pursuant to the good neighbor provision. The court in *EME Homer City II* declared the CSAPR phase 2 ozone season emission budgets of 11 states invalid, including Texas, holding that those budgets over-control with respect to the downwind air quality problems to which those states were linked for the 1997 ozone NAAQS.<sup>4</sup>

In our response to *Homer City II*, we addressed Texas’s ozone-season emissions budget in the regulation, CSAPR Update, which was promulgated in 2016 to address the requirements of the good neighbor provision for the 2008 ozone NAAQS.<sup>5</sup> In the original 2011 CSAPR, EPA noted that the reductions for 11 states, including Texas, may not be sufficient to fully eliminate all significant contribution to nonattainment or interference with maintenance for certain downwind areas with respect to the 1997 ozone NAAQS because EPA’s analysis projected continued nonattainment and maintenance problems at downwind receptors to which these upwind states were linked after implementation of the CSAPR trading programs. Specifically, exceedances were expected in Baton Rouge, Louisiana; Houston, Texas; and Allegan, Michigan according to the remedy case modeling conducted for the original CSAPR rule. The CSAPR Update used 2017 as the analytic year for the air quality modeling to determine nonattainment and maintenance receptors and states linked to those receptors. We evaluated this 2017 modeling to determine whether additional emission reductions would be needed in these 11 states, including Texas, to address the states’ full good neighbor obligation for the 1997 ozone NAAQS.

Despite our conclusion in the 2011 CSAPR that the 1997 ozone transport problems to which Texas was linked were not fully resolved, the court concluded in *EME Homer City II* that

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<sup>4</sup> *EME Homer City II*, 795 F.3d at 129–30, 138 (DC Cir. Ct. App. 2015).

<sup>5</sup> CSAPR Update Rule for the 2008 ozone NAAQS, 81 FR 74504, October 26, 2016.

the ozone season emission budget finalized for Texas may result in over-control as to the ozone air quality problems to which the state was linked. 795 F.3d at 129–30. In response to this determination, we removed Texas’s phase 2 ozone season budget as a constraint in the 2017 air quality modeling conducted for the CSAPR Update. EPA concluded that, even in the absence of this constraint, the 2017 air quality modeling shows that the predicted average design values (DVs)<sup>6</sup> used to identify nonattainment receptors and the maximum DVs used to identify maintenance receptors would both be below the level of the 1997 ozone NAAQS for the downwind receptors of concern to which Texas was linked in the original CSAPR rulemaking with respect to the 1997 ozone NAAQS. Accordingly, we found that Texas emissions would no longer contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 1997 ozone NAAQS. (*See generally*, 81 FR 74504). Consistent with this finding, we removed the FIP requirements associated with the 1997 ozone NAAQS, and sources in Texas were no longer subject to the phase 2 ozone season budget calculated to address that standard. *See* 40 CFR 52.38(b)(2)(ii) (relieving sources in Texas of the obligation to comply with the remanded phase 2 ozone season emission budgets after 2016).<sup>7</sup>

*B. Texas SIP Submittals Pertaining to the 1997 8-Hour Ozone NAAQS and Interstate Transport of Air Pollution*

Texas made the following SIP submittals to address CAA requirements to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other states: (1) an April 4, 2008 submittal stating that the state had addressed any potential CAA section 110(a)(2) infrastructure issues associated with the 1997

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<sup>6</sup> DVs are used to determine whether a NAAQS is being met.

<sup>7</sup> EPA notes that, because Texas was linked to downwind air quality problems with respect to the 2008 ozone NAAQS in its analysis, the EPA promulgated a new ozone season NO<sub>x</sub> emission budget to address that standard at 40 CFR 97.810(a).

ozone NAAQS, including the first two sub-elements for interstate transport in (CAA section 110(a)(2)(D)(i)(I)) and (2) a separate, but similar May 1, 2008 submittal which discussed how the first two sub-elements of the good neighbor provision were addressed with respect to the 1997 ozone standards. For the reasons described below, this action proposes to approve the state's two SIP submittals with respect to the state's conclusions regarding the first two sub-elements of the good neighbor provisions at CAA section 110(a)(2)(D)(i)(I) for the 1997 ozone NAAQS. See Docket No. EPA-R06-OAR-2008-0408 in [www.regulations.gov](http://www.regulations.gov).

## **II. The EPA's Evaluation**

Each of the above-referenced Texas SIP submittals relied on (1) EPA's CAIR modeling document, "Technical Support Document for the Final Clean Air Interstate Rule – Air Quality Modeling, March 2005"<sup>8</sup> and (2) emission controls found in the Texas SIP to support a conclusion that the Texas SIP had adequate provisions to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in any other state. The SIP submittals rely on the conclusion in the CAIR rulemaking that Texas would not significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in downwind states. While CAIR was still in place at the time the state submitted its SIPs, as discussed above, the rule was remanded by the D.C. Circuit in 2008 because the court found it was "fundamentally flawed" and must be replaced "from the ground up." *North Carolina*, 531 F.3d at 929-30. Accordingly, we cannot approve the state's SIP submittals based on the CAIR analysis. However, more recent information provides support for our proposed approval of the conclusions in the SIP submittals that the state will not significantly

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<sup>8</sup> Document EPA-HQ-OAR-2003-0053-2151 in [regulations.gov](http://www.regulations.gov).

contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in any other state.

The updated air quality modeling conducted for the original CSAPR rulemaking projected the effect of emissions on ambient air quality monitors (receptors). The modeling projected that in 2012: (1) A receptor located in East Baton Rouge Parish, Louisiana (monitor ID 220330003) would have difficulty attaining and maintaining the 1997 8-hour ozone NAAQS; and, (2) A receptor located in Allegan County, Michigan (monitor ID 260050003) would have difficulty maintaining the 1997 8-hour ozone NAAQS (76 FR 48208, 48236, August 8, 2011). The modeling also showed that Texas emissions were projected to contribute more than the threshold amount of ozone pollution necessary to be considered “linked” to these receptors for the 1997 8-hour ozone NAAQS (76 FR 48208, 48246, August 8, 2011). These were the only ozone receptors with projected air quality problems to which Texas was found to be linked.

In CSAPR we used air quality projections for the year 2012, which was also the intended start year for implementation of the CSAPR Phase 1 EGU emission budgets, to identify receptors projected to have air quality problems. The CSAPR final rule record also contained air quality projections for 2014, which was the intended start year for implementation of the CSAPR Phase 2 EGU emission budgets. The 2014 modeling results projected that before considering the emissions reductions anticipated from implementation of CSAPR: (1) The East Baton Parish receptor would have an average 8-hour ozone DV of 84.1. parts per billion (ppb) and a maximum DV of 87.7 ppb; and, (2) The Allegan County, Michigan would have maximum DV of 83.6 ppb.<sup>9</sup> We used a value of 85 ppb to determine whether a particular ozone receptor should be identified

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<sup>9</sup> See projected 2014 base case average and maximum DVs for these monitors at pages B-14 and B-16 of the June 2011 Air Quality Modeling Final Rule Technical Support Document for CSAPR, Document ID No. EPA-HQ-OAR-2009-0491-4140, available in [regulations.gov](http://www.regulations.gov).



as having air quality problems that may trigger transport obligations in upwind states with regard to the 1997 8-hour ozone NAAQS (76 FR 48208, 48236).

The 2014 modeling results show that the Allegan County, Michigan monitor which Texas was linked to in the 2012 modeling was no longer projected to have air quality problems sufficient to trigger transport obligations with regard to the 1997 8-hour ozone NAAQS. Thus, Texas was no longer projected to interfere with maintenance of the 1997 ozone NAAQS at the Allegan County receptor in 2014. However, the 2014 modeling results continued to project that the East Baton Parish receptor would have problems maintaining the 1997 ozone NAAQS.

As discussed above, in response to the remand of Texas's CSAPR phase 2 ozone season budget by the D.C. Circuit in *EME Homer City II*, EPA reviewed the 2017 air quality modeling conducted for the CSAPR Update. EPA concluded that, even in the absence of Texas's CSAPR budget, both the Baton Rouge and Allegan receptors would have average and maximum DVs below the level of the 1997 ozone NAAQS for the downwind receptors of concern to which Texas was linked in the original CSAPR rulemaking with respect the 1997 ozone NAAQS. Accordingly, EPA found that Texas emissions would no longer contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 1997 ozone NAAQS at either receptor or in any other state. (81 FR 74525-26). This conclusion is based on EPA's most recent modeling analysis and is supported by the fact that the Baton Rouge area has monitored attainment of the 1997 ozone standard since 2008.

### **III. Proposed Action**

We are proposing to approve the portions of the April 4, 2008 and May 1, 2008 Texas SIP submittals as they pertain to the requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS. We propose to find that the conclusion in the state's SIP submittals

is consistent with EPA's conclusion regarding the Texas's good neighbor obligation, that emissions from Texas will not significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in any other state.

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Ozone.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: September 26, 2018.

**Anne Idsal,**

*Regional Administrator, Region 6.*

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